No. 512

OCT 16 1956

JOHN T. FEY, Clerk

United States Court of Appeals

FOR THE THIRD CIRCUIT

NO. 11,878

ANNE LIVINGSTON BEHR, Appellant,

v.

MINE SAFETY APPLIANCES COMPANY, a Corporation of the State of Pennsylvania; CARBON MONOXIDE ELIMINATOR CORPORATION, a Corporation of the State of Delaware; CATALYST RESEARCH CORPORATION, a Corporation of the State of Maryland; GEORGE H. DEIKE; WILLIAM P. YANT; JOHN F. BEGGY; JOHN T. RYAN, JR.; W. DENNING STEWART; POTTER BANK AND TRUST CO., Executor of the Estate of Howard Zacharias, Deceased; and JOHN T. RYAN, JR., and JOHN F. BEGGY, Administrators of the Estate of John T. Ryan, Deceased; and JOSEPH H. HIRSHHORN.

Appeal From Orders of the United States District Court for the Western District of Pennsylvania at No. 12010, Denying Plaintiff's Motions to Strike, Striking the Affidavit of Plaintiff and Granting Defendants' Motions to Dismiss.

PETITION FOR REHEARING AND APPENDIX.

PAUL GINSBURG
Counsel for Appellant-Petitioner

550 Grant Street
Pittsburgh 19, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

PETITION FOR REHEARING

To the Honorable, the Chief Judge and the Judges of said Court:

The petition of Anne Livingston Behr, appellant, respectfully represents:

1. On May 18, 1956, the Opinion and Order of this Honorable Court were entered, pursuant to which the motions of the appellees to dismiss the appeal were granted and the appeal dismissed. The last sentence of said Opinion is as follows: "This conclusion makes it unnecessary to deal with a motion filed by the plaintiff to 'limit the contents of the appendix and so forth' ". An examination of said Opinion and Order does not at all disclose the fact that the words "and so forth" have been used to replace the words "and to Strike and Suppress Certain Original Papers", thus giving the mistaken impression that the Court naturally would not limit the contents of the appendix of a dismissed appeal, rather than the real fact that the Court would not first (or at all) pass upon plaintiff's motion to Strike and Suppress Certain Original Papers which should materially affect the Court's consideration of the motions to dismiss the appeal and cause their denial.

2. Had the Court first considered the plaintiff's said motion, it should have pursuant to the applicable law stricken and suppressed defendant Joseph H. Hirshhorn's Motion to Set Aside Entry of Default and his Statement of Reasons for Opposition to Counsel for Plaintiff's Motion to Strike Under Rule 11, which would cleanse the record and render them a nullity. Then it would follow that the appellees' motions to dismiss this appeal would be insupportable and untenable. This

Court's refusal so to strike and suppress creates a *conflict* with its decision handed down last year at appeal No. 11,499 in the case of *Paul Ginsburg, Appellant, v. Horace Stern, et al.;* and further may create an *impression* that this Court will discriminatorily strike against but not for Paul Ginsburg, Esquire. The Supreme Court of the United States in the recent case of *In Re Murchison* (1955), 349 U. S. 133, held in its Opinion by Mr. Justice Black (p. 136) that to perform its highest function in the best way "Justice must satisfy the appearance of Justice". In this connection it is further submitted that the Court overlooked or misapprehended the point that the Orders of the lower court which are the subject of this appeal, are products of bias rather than simply as Judge Marsh admitted in his Opinion, "* * * mistakes of law in decisions I have made in the past in various phases of this and of another action".

3. Furthermore, the Court erred in ignoring the following paragraph contained in appellant's memorandum, action on which should render Hirshhorn's motion to dismiss the appeal a nullity:

> The objectionable matters hereinabove referred to which are the subject of the instant motion to strike and suppress were entirely unnecessary, because prior to the publishing thereof defendant Hirshhorn had already waived his right to object to the Court's jurisdiction over him. Hirshhorn had already submitted to the Court's jurisdiction *inter alia* by his (a) filing a Motion to Dismiss Complaint as to Defendant, Joseph H. Hirshhorn, after the expiration of the 20 days set forth in the Notice to

plead, to-wit, on March 31, 1955; (b) filing a Motion for Extension of Time to Answer Interrogatories dated April 13, 1955, and presented in Open Court on April 27, 1955; which motion certainly cannot be made without submitting to the Court's jurisdiction; (c) filing a Motion to Set Aside Entry of Default dated May 11, 1955, on May 13, 1955; all of which pleadings are signed by Defendant Hirshhorn's attorneys without limitation of their authority to appear for him.

4. The Court overlooked or misapprehended the point that plaintiff's said Motion to Strike and Suppress was not denied by the appellees other than Hirshhorn and that, therefore, its allegations must be taken as admitted to be true by them and binding upon them.

5. The Court, particularly Judge Kalodner, erred in applying herein its decision in the case of *Raughley v. Pennsylvania Railroad,* 230 F2d 387 (3rd Cir. 1956), Judge Kalodner dissenting therein, because *inter alia* this record has the distinguishing feature of containing an Affidavit of Plaintiff (App. 7a-10a) filed pursuant to 28 U.S.C.A. Section 144, which provides: "Whenever a party to any proceeding in a district court *makes and files* a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, *such judge shall proceed no further therein,* but *another judge shall* be assigned to hear such proceeding" (Italics supplied).

The filing of said affidavit automatically disqualified Judge Marsh and tolled the running of time for appeal. In the said dissent of Judge Kalodner (p. 393) he stated,

"* * * the Rules do not specifically deal with the subject of reconsideration of summary judgments under Rule 12(c). That being so there is every reason why appellate courts should refrain from calling into play 'unwritten' Rules which would operate to deprive a district court of its inherent discretion to reconsider, when the ends of justice and efficient judicial administration so require, summary judgments of the kind here involved". Therefore, so far as plaintiff's Motions for Reconsideration are concerned, which were duly considered in the lower court, the court should have applied the principle of said opinion of Judge Kalodner in considering the time for appeal and in this case *a fortiori* in view of plaintiff's affidavit. It is further submitted that in this regard the Court overlooked, and erred in not applying the law set forth in its recent (1955) decision in the case of *Kelly v. Pennsylvania Railroad Co.,* 3 Cir., 228 F 2d 727, in which it was held that reconsideration is simply a request that the Court reconsider its action upon the original motion; and, if granted, the original motion is heard anew on the original papers just as though never previously heard.

6. The Court erred in refusing to review and reverse Judge Marsh's Order striking the said Affidavit of Plaintiff, which was entered at the same (delayed) time as his Order dismissing the complaint on motion of Reed, Smith, Shaw & McClay, which Order was included in the notice of appeal. In the light of the applicable law, a review of said Affidavit of Plaintiff (App. 7a-10a) which was filed promptly after dismissal of Petition To Disqualify Hon. Rabe F. Marsh, Jr., (App. 1a-6a), should result in an Opinion that it was legally sufficient and the Order striking it should be vacated. Such review would

reveal additional evidence of the bias of Judge Marsh in that he gave an unfair, unjust, insupportable advantage over the widow Behr to Joseph H. Hirshhorn who admittedly was "twice convicted for violation of the Foreign Exchange Laws of Canada and was then under investigation by the Attorney General of the State of New York in relation to certain dealings as promoter of the American-Canadian Uranium Co., Ltd." (App. 7a-8a); and that said advantage *ipso facto* inured to the benefit of Reed, Smith, Shaw & McClay with whom Judge Marsh's brother, Edward W. Marsh, Esquire, was and is associated (App. 3a, 10a).

7. In connection with plaintiff's claim that Judge Marsh's refusal to permit her to intervene in the prior Hirshhorn suit was untenable, this Court should have considered the recent (1956) Opinion of Bicks, D. J., in the case of *Breswick & Co. and Myron Neisloss, as stockholders of Allegheny Corporation and on behalf of themselves and all other stockholders similarly situated, Plaintiffs, v. O. Henry Briggs, Clint W. Murchison, Sid W. Richardson, John D. Murchison, Clint W. Murchison, Jr., Robert R. Young, Allegheny Corporation, et al., Defendants,* U. S. D. Ct., S. D. N. Y., 138 F. S. 747, wherein the Court held (p. 750): "Denial of the application (to intervene) will be prejudicial, indeed well nigh fatal, to the plaintiffs. Granting the same will sustain vitality in a suit which might otherwise come to an end without a determination on the merits. If that constitutes prejudice to the defendants, the Court cannot take cognizance thereof." What an unusually courageous decision for the Court in New York to make against some of the wealthiest men in the world!

8. The Court's refusal to uphold plaintiff's contention that section 144 of the Judicial Code should be liberally construed and all averments of her affidavit (App. 7a-10a) must be taken as undeniably true by Judge Marsh and that, therefore, said affidavit is legally sufficient, unlawfully laid the basis for this Court's Order of dismissal which is in *conflict* with the law as laid down by the United States Supreme Court in the case of *Berger v. United States,* 255 U. S. 22 (1921), wherein the Court (p. 30) rejected the contention of the Solicitor General that the action of the affidavit is not "automatic".

9. In view of the preceding allegation, it is respectfully submitted that the Court overlooked or misapprehended the following *inter alia,* from appellant's Memorandum In Opposition To Motions To Dismiss Appeal:

> In the case of *Allen v. duPont, et al.* (1948) 75 F. Supp. 546, the Court, p. 549, held: "The statute in question should be interpreted liberally. Certainly with its objectives no one can complain, least of all a judge who has any regard for the sanctity and the solemnity of his oath". A liberal construction of plaintiff's affidavit would show personal bias and prejudice not only against her but also in favor of defendants who are represented by attorneys with whom Judge Marsh's brother, Attorney Edward W. Marsh, is associated.
>
> *Furthermore, the action of the affidavit of disqualification is automatic.* In the case of *United States v. Shibley* (1953), 112 F. Supp. 734, the Court held, p. 748, that "The disqualification is

automatic if the facts stated in the affidavit are legally sufficient". In the case of *Berger v. United States,* 255 U.S. 22 (1921), the United Statess Supreme Court (p. 30) rejected the contention of the Solicitor General that the action of the affidavit is not "automatic". The said case laid down the test for determining the sufficiency of an affidavit of personal bias and prejudice, at page 33, as follows: "Of course the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of bent of mind that may prevent or impede impartiality of judgment. The affidavit of defendants has that character. The facts and reasons it states are not frivolous or fanciful but substantial and formidable and they have relation to the attitude of Judge Landis' mind toward defendants". The Court continued, page 35, as follows: "We are of opinion, therefore, that an affidavit upon information and belief satisfies the section and that upon its filing, if it show the objectionable inclination or disposition of the judge, which we have said is an essential condition, it is his duty to 'proceed no further' in the case. And in this there is no serious detriment to the administration of justice nor inconvenience worthy of mention, for of what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside? * * *"

10. In view of the foregoing, none of the cases cited in support of the Order of dismissal is pertinent or applicable herein.

11. The Court's refusal to grant the appellant's Motion To Strike And Suppress, to vacate Judge Marsh's Order striking the Affidavit of Plaintiff, and to deny appellees' motions to dismiss the appeal, constitutes a violation and deprivation of the federal rights of appellant-petitioner and her counsel as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Wherefore, petitioner prays that this Honorable Court grant a rehearing.

PAUL GINSBURG
Counsel for Appellant-Petitioner.

AFFIDAVIT AND CERTIFICATE OF COUNSEL.

Commonwealth of Pennsylvania }
County of Allegheny } ss.:

Before me, a Notary Public in and for said county and state, personallly appeared Paul Ginsburg who, being duly sworn according to law, deposes and says that he is counsel for the appellant-petitioner, that he has knowledge of the facts contained in the foregoing Petition For Rehearing and that the facts set forth therein are true and correct; and that the said Petition is filed in good faith and not for delay.

PAUL GINSBURG

Sworn to and subscribed before me this 28th day of May, 1956.

D. EUGENE SHAW
[SEAL] Notary Public.

My commission expires February 2, 1957.

APPENDIX.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ANNE LIVINGSTON BEHR, Plaintiff
v.
MINE SAFETY APPLIANCES COMPANY, et al., Defendants
Civil Action No. 12010

Petition to Disqualify Hon. Rabe F. Marsh, Jr.

To the Honorable, the Chief Judge and the Judges of said Court:

The petition of Paul Ginsburg, attorney for plaintiff, respectfully represents:

1. On November 15, 1955, arguments were heard before Hon. Rabe F. Marsh, Jr. in the above action concerning various motions between plaintiff and defendant Joseph H. Hirshhorn, and plaintiff and defendants other than Hirshhorn.

2. In the course of said arguments a most important issue was the terms of an agreement between petitioner and Benjamin Heffner, New York attorney for defendant Hirshhorn. Until after argument thereon, petitioner had no reason to believe that his position thereon would require any further support as the opposing contention is not at all adequately supported, and is contradicted by the record. However, after argument on November 15, 1955, petitioner secured the affidavit of Daniel L. Tate in support of Plaintiff's Entry of Default Against Defendant Hirshhorn, Motion Under

Rule 37a, Motion to Strike Under Rule 11, and a Motion to Strike Under Rules 11 and 12(f), and filed it the same day with Notice to opposing counsel that it would be presented at 10:00 o'clock A.M. on November 16, 1955, to Hon. Rabe F. Marsh, Jr., in Court Room No. 1, when and where said Daniel L. Tate would be present as a going witness to give his oral deposition in support of his affidavit and be available for cross-examination. A copy of the said Affidavit of Daniel L. Tate, together with the said Notice, is attached hereto, made part hereof, and marked Exhibit "A".

3. The reason for petitioner's securing the Tate Affidavit and presenting it hurriedly was his observing a continuance of Judge Marsh's prejudice towards him at the argument. Throughout the course of this litigation, and other litigation, Judge Marsh's prejudice and his bias against petitioner has been most damaging and harmful to his clients as well as himself. Judge Marsh's prejudgments have been evidenced in previous experiences and Court Orders.

4. On November 16, 1955, petitioner appeared before Judge Marsh, accompanied by said Daniel L. Tate, for the above stated purposes, but the Judge refused to let Mr. Tate be heard then or at any other future time. Present for Defendant Hirshhorn was Attorney Sherman T. Rock who has been reinstated as, and is a member of the firm of Paul, Lawrence & Rock. Judge Marsh as usual permitted Attorney Rock to act unprofessionally and make false, slanderous and other unsupportable statements for the record concerning your petitioner. Similarly on the preceding day Judge Marsh permitted Attorney Paul E. Hutchinson of Reed, Smith, Shaw &

McClay to make offensive, self-serving statements for the record which are contradicted by prior records. Reed, Smith, Shaw & McClay represent all defendants other than Hirshhorn. During the early years of the Hirshhorn suit Attorney Sherman T. Rock was associated with Reed, Smith, Shaw & McClay. During the entire course of the foregoing litigation Judge Marsh's brother, Edward W. Marsh, Esquire, has been associated with Reed, Smith, Shaw & McClay.

5. In the course of said proceedings on November 16, 1955, it was disclosed to petitioner for the first time that Judge Marsh had ex parte authorized Attorney Sherman T. Rock to draft Orders of Court for Judge Marsh to sign, granting all of Hirshhorn's Motions and denying all of your petitioner's motions.

6. On prior occasions your petitioner, with restraint, refrained from seeking Judge Marsh's disqualification, but now represents that in the interest of justice it must be accomplished.

7. A serious doubt is hereby raised as to whether or not Judge Marsh has violated Canons 10, 11, 13, 33, 36 of the Canons of Judicial Ethics.

8. Another Judge of this Honorable Court should be substituted for Judge Marsh in the above action, and the substituted Judge should review the record and the Orders thereon and also conduct a Hearing to determine the future conduct of the case, all pending Orders in the meantime being stayed.

WHEREFORE, petitioner prays that this Honorable Court enter an Order substituting another Judge for Hon. Rabe F. Marsh, Jr., in the above action; that the

said substituted Judge, after examining the record and the Orders thereon, conduct an appropriate Hearing to determine the effect of the said prejudice against petitioner upon this case and, in the meantime, stay all pending Orders and proceedings.

s/ PAUL GINSBURG
Petitioner

AFFIDAVIT

Commonwealth of Pennsylvania
County of Allegheny } ss.:

Before me a Notary Public in and for said County and State personally appeared Paul Ginsburg, who, being duly sworn according to law deposes and says that the facts set forth in the foregoing petition are true and correct.

s/ PAUL GINSBURG

Sworn to and subscribed before me this 16th day of November, 1955.

s/ BINA B. ZEIDMAN
[SEAL] Notary Public
Pittsburgh, Allegheny County

My commission expires February 5, 1959.

EXHIBIT "A"

AFFIDAVIT OF DANIEL L. TATE

Commonwealth of Pennsylvania
County of Allegheny } ss.:

Before me a Notary Public in and for said County and State personally appeared DANIEL L. TATE, who, being duly sworn according to law deposes and says that he is a resident of Hudson, Ohio; that his occupation is Publisher's Representative for Life magazine; that in the course of his employment he often makes business trips to Pittsburgh, Pennsylvania where he stays at the Carlton House; that during the month of March 1955 he was registered in Room 720 at Carlton House from the 14th through the 18th; that on or about the 18th of March, 1955 he happened to be in Suite 1635 permanently occupied by Attorney Paul Ginsburg, where and when a friendly discussion took place between Attorney Ginsburg and himself; that in the course of the said discussion a long distance phone call apparently from New York City, from one who represented himself to be an attorney for Joseph H. Hirshhorn, came through for Attorney Paul Ginsburg; that it was obvious to him throughout the telephone conversation that the attorney from New York was seeking an extension of time to file a pleading for Mr. Hirshhorn in certain litigation in which Attorney Ginsburg represented the plaintiff against the said Hirshhorn; that Attorney Ginsburg seemed quite willing to oblige the party on the other end of the line in permitting him to have an extension of time if the said party would agree to have his client, Mr. Hirshhorn answer interrogatories for the plaintiff, Mr. Ginsburg's client; that it was obvious from the

conversation on Ginsburg's end of the line that agreement had been reached whereby Hirshhorn's attorney would be permitted to file a pleading late and in consideration thereof secure for Mr. Ginsburg's client answers to interrogatories from Hirshhorn; that after the arrangement had been agreed upon and the telephone conversation ended, Attorney Ginsburg seemed quite elated, and upon inquiry his elation was attributed to the agreement between the one representing Hirshhorn that he would secure the answers to plaintiff's interrogatories for Attorney Ginsburg; and that one reason in particular why he recalls the foregoing conversation is that Mr. Ginsburg and he had discussed some of Attorney Ginsburg's litigation on previous occasions and that he had just finished informing him of how fortunate Ginsburg felt on behalf of his client in the above case in having secured personal service of the complaint upon Mr. Hirshhorn in New York City through the U. S. Marshal.

DANIEL L. TATE

Sworn to and subscribed before me this 15th day of November, 1955.

BINA B. ZEIDMAN
Notary Public
Pittsburgh, Allegheny County

[SEAL]

My commission expires February 5, 1959.

Affidavit of Plaintiff.

State of New York
County of New York } ss.:
City of New York

Before me, a Notary Public in and for said City and County and State, personally appeared Anne Livingston Behr, plaintiff above named, who being duly sworn according to law deposes and says that she believes the Honorable Rabe F. Marsh, Jr., is prejudiced and biased against her cause and her counsel; and that as a result she will be unable to have a fair trial of this case unless he is removed therefrom and another judge of this Honorable Court substituted for him; and that accordingly she is filing this affidavit pursuant to the Judicial Code (28 USCA Section 144); and that in support hereof she respectfully submits:

1. Judge Marsh has denied plaintiff her right to discovery as guaranteed by Rule 26(a) of the Rules of Civil Procedure by ordering her to answer interrogatories of a defendant before requiring defendant first to answer her interrogatories.

2. In the prior proceeding known as the Hirshhorn suit, Judge Marsh denied plaintiff her right to intervene as a party plaintiff therein, holding that her interests were adequately represented by Joseph H. Hirshhorn, the original plaintiff therein and a named defendant herein, although her undenied allegations were that Hirshhorn was not in possession of all necessary and pertinent information to prosecute the case adequately or to negotiate a fair settlement; and that Hirshhorn had been twice convicted for violation of the Foreign

Exchange Laws of Canada and was then under investigation by the Attorney General of the State of New York in relation to certain dealings as promoter of the American-Canadian Uranium Co., Ltd.; and she also alleged that she was informed and believed that Hirshhorn was attempting to negotiate a settlement of that case which would be prejudicial to her. When plaintiff appealed Judge Marsh's refusal to permit her to intervene, Judge Marsh refused to file an Opinion, which put her in an unfair and difficult position before the Court of Appeals. The record in the instant case now shows that in the Hirshhorn suit, Joseph H. Hirshhorn was actually interested in both sides of the case as he was not only a stockholder of Carbon Monoxide Eliminator Corporation, but also was a stockholder of Mine Safety Appliances Company, the principal defendant; and further that promptly after Hirshhorn had lost that case, he sold all of his shares of stock of Carbon Monoxide Eliminator Corporation to defendant Mine Safety Appliances Company at a price above the market value without disclosing to plaintiff or other minority stockholders (whom he claimed to be so adequately representing) that he was negotiating the sale. Although Hirshhorn claimed that the Carbon Monoxide Eliminator Corporation stock was really worth over one hundred dollars per share, its current market value is less than one dollar per share.

3. After Hirshhorn was served personally by the U. S. Marshal with the Complaint, Summons and Notice to plead, he moved Judge Marsh to dismiss this case as to him for lack of jurisdiction. Although the motion was filed too late under the rules and Hirshhorn through his attorneys took steps which constituted submission to the Court's jurisdiction, nevertheless Judge Marsh

granted the Motion to Dismiss and a Motion to Set Aside Entry of Default against Hirshhorn. Furthermore, Judge Marsh denied plaintiff's Motion Under Rule 37(a) to compel Hirshhorn to answer interrogatories while he was a defendant, being fully informed and aware that Hirshhorn's testimony otherwise may never be available because *inter alia* he plans to move and spend most of his time out of the United States.

4. In the course of Hirshhorn's activity herein, his Pittsburgh attorneys put in issue impertinently and incompetently untrue assertions relating to an agreement which was partly written and partly oral between plaintiff's attorney and Hirshhorn's New York attorney, Benjamin Heffner. Plaintiff's attorney, Paul Ginsburg, Esquire, had no reason to believe that Judge Marsh would accept as true the hearsay statements of Hirshhorn's Pittsburgh attorneys rather than the allegations of Attorney Ginsburg who was a party to the agreement, and so Attorney Ginsburg did not attempt to support his allegations prior to November 15, 1955, the day set for arguments. However, promptly thereafter, on the same day Attorney Ginsburg filed the Affidavit of Daniel L. Tate in support of Plaintiff's Entry of Default against Defendant Hirshhorn, Motion Under Rule 37(a), and Motions to Strike Under Rules 11 and 12(f). Judge Marsh that day refused to strike the untrue, scandalous assertions of Hirshhorn's attorneys, thus unduly and unjustly reflecting upon plaintiff's attorney; and the following day refused to hear said Daniel L. Tate or given any consideration to his affidavit.

5. Judge Marsh's dismissal of the Complaint as to Hirshhorn and his refusal to compel him to answer

plaintiff's interrogatories have unfairly hurt plaintiff's cause, and benefited the defendants other than Hirshhorn, all of whom are represented by Reed, Smith, Shaw & McClay with which firm Judge Marsh's brother, Edward W. Marsh, Esquire, is associated.

s/ ANNE LIVINGSTON BEHR

Sworn to and subscribed before me this 29 day of November, 1955.

[SEAL] Notary Public

Certificate of Counsel.

I hereby certify that the foregoing affidavit is filed in good faith.

s/ PAUL GINSBURG
Attorney for Plaintiff
550 Grant Street
Pittsburgh 19, Pa.

FILED
NOV 10 19
JOHN T. FEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 512

ANNE LIVINGSTON BEHR, Petitioner,

v.

MINE SAFETY APPLIANCES COMPANY, et al.,
Respondents.

BRIEF FOR RESPONDENTS OTHER THAN JOSEPH H. HIRSHHORN IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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GILBERT T. HELWIG
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 512

ANNE LIVINGSTON BEHR, Petitioner,

v.

MINE SAFETY APPLIANCES COMPANY, et al., Respondents.

BRIEF FOR RESPONDENTS OTHER THAN JOSEPH H. HIRSHHORN IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals dismissing plaintiff's appeal is reported at 233 F2d 371 and appears in Petitioner's App. pp. 1-5.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Where an order of the District Court dismissing an action was entered on January 3, 1956, and notice of appeal therefrom was not filed until February 13, 1956, is such an appeal timely under 28 U.S.C., Section 2107, of the United States Court and Rule 73(b) of the Federal Rules of Civil Procedure?

2. Is the period for appeal from such order tolled or extended by the filing and denial during the appeal period of a motion for reconsideration?

STATUTE INVOLVED

The case involves the provisions of Section 2107 of Title 28 of the United States Code:

> "Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.
>
> "In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.
>
> "In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from if it is a final decision, and within fifteen days after its entry if it is an introductory decree.

"The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

"This section shall not apply to bankruptcy matters or other proceedings under Title 11. As amended May 24, 1949, c. 139 §§ 107, 108, 63 Stat. 104."

STATEMENT OF THE CASE

This action was commenced in the United States District Court for the Western District of Pennsylvania on February 23, 1954, by the filing of a complaint by the petitioner herein. On March 25, 1954 all of the named defendants, other than Joseph H. Hirshhorn, filed an answer, and concurrently, filed and served interrogatories directed to the plaintiff.

On April 23, 1954, said defendants filed a motion under Rule 37 (a) of the Rules of Civil Procedure seeking an order to compel the plaintiff in said action to file proper answers to said interrogatories.

On June 28, 1955, after various procedural delays, an order was entered directing the plaintiff to answer certain of said interrogatories within fifteen (15) days. Plaintiff failed to file such answers, but on the fifteenth day following entry of such order filed a motion to set aside and vacate the order requiring the filing of such answers. On November 16, 1955, after hearing, plaintiff's motion to vacate and set aside the order requiring her

to answer was dismissed, and plaintiff was again ordered to answer said interrogatories within fifteen (15) days.

On December 1, 1955, the date on which plaintiff's answers to said interrogatories were due, plaintiff filed an affidavit of prejudice under Section 144 of the Judicial Code directed against Honorable Rabe F. Marsh by whom all motions and hearings were heard and all orders entered in said proceeding were made. No answers were filed to defendants' said interrogatories.

On December 10, 1955, said defendants filed a motion to dismiss the complaint because of plaintiff's failure to file answers to its interrogatories, despite the orders of court and the provisions of the Rules of Civil Procedure.

On January 3, 1956, the District Judge Rabe F. Marsh, before whom the matter was pending, entered a memorandum and order declaring the affidavit of prejudice filed pursuant to Section 144 of Title 28 to be insufficient to require his disqualification and striking same. (App. p. 10) Thereafter, on the same date, January 3, 1956, he entered an order granting defendants' motion to dismiss plaintiff's action. (App. p. 11)

On January 25, 1956, plaintiff filed a motion for the reconsideration by the Court of a number of prior orders entered in the action, including the order declaring the affidavit of prejudice to be insufficient and the order granting said defendants' motion to dismiss. (App. p. 15) On the following day, January 26, 1956, the motion for reconsideration was denied. (App. p. 16)

On February 16, 1956, plaintiff filed notice of appeal to the United States Court of Appeals for the Third Circuit, (App. p. 16) indicating an intention to appeal,

inter alia, from the order of January 3, 1956, granting the motion of the defendants other than Hirshhorn to dismiss the action, and from the order dated January 26, 1956, denying Plaintiff's Motion for Reconsideration.

On April 4, 1956, the defendants, other than Hirshhorn, filed with the United States Court of Appeals for the Third Circuit a motion to dismiss plaintiff's appeal, on the grounds that it was untimely insofar as it related to the order of January 3, 1956 *dismissing plaintiff's action,* and that the order of January 26, 1956, denying plaintiff's motion for reconsideration of said orders was itself a nonappealable order.

Defendants' motion to dismiss plaintiff's appeal was granted by the Court of Appeals by order entered May 18, 1956, (App. p. 5) and it is this action which petitioner seeks to have reviewed by this Court on certiorari.

ARGUMENT

I. Petitioner's Appeal Was Untimely.

An appeal from a final order or judgment of the District Court must be taken within the time limitation provided by 28 U.S.C., Section 2107, unless (1) the running of the time for appeal is tolled or extended as provided in Rule 73 of the Rules of Civil Procedure, or (2) some special circumstance exists which makes the statute inapplicable.

Since the petitioner in the instant case did not file a notice of appeal from the order of the District Court entered January 3, 1956, until February 16, 1956, it is obvious that she has failed to meet the statutory requirements and that her appeal is untimely unless some other basis for extension of the appeal period is shown.

Petitioner does not present in her "Reasons for Granting the Writ" the occurrence of any event or circumstance which tolled the appeal time from the orders of January 3, 1956, nor can petitioner contend that the order of the District Court entered on January 26, 1956 denying her motion for reconsideration, either tolled the period of appeal or was itself an appealable order. That an order refusing a motion for rehearing is not an appealable order is well established in *Wayne United Gas Co. v. Owens-Illinois Glass Co.,* 300 U.S. 131, 81 L. Ed. 557, in which your Honorable Court said in part p. 137, as follows:

> "The granting of a re-hearing is within the court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal. A defeated

party who applies for a rehearing and does not appeal from the judment or decree within the time limitation for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to entertain it, does not extend the time for appeal."

Petitioner's request that the order of the Court of Appeals denying her appeal as untimely filed should be reviewed by your Honorable Court on certiorari appears to rest on her contention that the District Judge lacked jurisdiction to make the order appealed from. This is the same proposition which petitioner presented in the Court of Appeals and which the Court of Appeals rejected. It obviously goes to the *merits* and not to the timeliness of her appeal and we are not concerned with arguments which petitioner might have raised on appeal if she had perfected an appeal. In any event petitioner's contention that the District Judge lacked jurisdiction, presents no basis for the review of the order of the Court of Appeals dismissing her appeal as untimely. Such order must stand unless it is shown to be in conflict with other applicable decisions of your Honorable Court or otherwise of such character that it calls for the exercise of the power of supervision vested in your Honorable Court.

No such showing has been made.

II. No Conflict or Other Basis for Review on Certiorari Is Presented.

The defendants here involved moved to dismiss petitioner's appeal from an order of the District Court dismissing her action because the said appeal was untimely on its face. The Court of Appeals granted defendants' motion and held the appeal to be untimely.

The only relevant reason assigned by the petitioner for the granting of review on Writ of Certiorari is that the decision of the Court of Appeals is in conflict with an applicable decision of this Honorable Court in the case of *Berger v. United States,* 225 U.S. 22. (Pet's. Brief, p. 12)

Petitioner asserts that such alleged conflict is evidenced by the refusal of the Court of Appeals to hold that the mere filing of an affidavit of prejudice under 28 U.S.C., Section 144, automatically disqualifies the Judge against whom it is directed from further proceeding in the case.

Such statement is incorrect. No such conflict exists. In the *Berger* case, supra, certain questions were certified from the Court of Appeals relating to the sufficiency of an affidavit of personal bias or prejudice of a Federal District Judge who was to preside at a district trial. Your Honorable Court held in that case that the Trial Judge *could pass upon the legal sufficiency of the affidavit but not upon the truth or falsity of the facts therein affirmed.* This decision is completely in accord with the decision of the Court of Appeals which petitioner now

seeks to have reviewed. The language of the Court of Appeals (App. p. 4) was as follows:

> "The plaintiff has cited us a good deal of authority which he says establishes the proposition that when an affidavit of prejudice is filed a judge's power to proceed with the case is ended. We do not need to go into all of the ramifications of this question. Suffice it to say that the mere filing of the affidavit does not automatically disqualify the judge. He has the authority to decide whether the case is legally sufficient. And having disposed of this claim, he is free to act in the case."

It will be noted from the Court's opinion and from the docket entries that Judge Marsh ruled on the plaintiff's affidavit before he dismissed the complaint as to the defendants, other than Hirshhorn. He was then free to act in the case.

Plaintiff's petition not only fails to disclose any error on the part of the Court of Appeals in dismissing the appeal but fails to disclose the existence of any conflict or to otherwise demonstrate any basis for review by your Honorable Court.

Certiorari should be denied.

Respectfully submitted,

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